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No. 87-946

In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF PALO ALTO, ET AL., APPELLANTS

v.

CENTURY FEDERAL, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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13 pp

QUESTION PRESENTED

Whether various conditions contained within a cable television license issued by municipal franchising authorities are invalid under the First Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

1. This case, which presents issues similar to those that were before the Court in *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986), involves a constitutional challenge to various provisions of a license authorizing the operation of a cable television system. Appellants, two California cities, issued a request for proposals (RFP) inviting applications for a franchise to construct and operate a cable television system to serve appellants' residents.[1] The RFP set forth minimum requirements for eligibility for the franchise. Several applicants responded to the RFP and, on October 7, 1985, the cable television franchise was awarded to one of those applicants. J.S. App. 17a-19a.

Appellee Century Federal did not seek to participate in the request for proposals process. It sought a franchise from appellants and, when its request was not granted,

[1] The group that issued the request for proposals also included a county and a university that are not parties to this appeal.

commenced an action in 1983 in the United States District Court for the Northern District of California alleging that the franchising process violated both the antitrust laws and the First Amendment. The district court dismissed the antitrust claims on the ground that appellants were immune from antitrust liability. It concluded that the constitutional claims raised factual questions that could not be resolved on a motion to dismiss. J.S. App. 47a-74a.

In response to the adoption of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, the district court entered an order in November 1984 stating its intent to dismiss appellee's constitutional claims (J.S. App. 80a-82a). The court observed that "[i]f a franchise has not been granted by December 29, 1984, the terms of the Act will apply to [appellants]" and "any remaining challenge [appellee] might have to [appellants'] authorization process would need to be in the form of a new lawsuit based either upon the terms of the Act or upon the ground that the Act itself is unconstitutional. Therefore, unless the Court is informed by affidavit that a franchise has been awarded before the [Act's] effective date, the Court intends to dismiss the action without prejudice on its own motion" (*id.* at 81a). The action subsequently was dismissed (*id.* at 83a).

Shortly after the issuance of the court of appeals' decision in *Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), aff'd on other grounds, 476 U.S. 488 (1986), appellee commenced the present action in the United States District Court for the Northern District of California, again challenging appellants' cable franchising process on First Amendment grounds (see J.S. App. 84a-105a). Following this Court's decision in *City of Los Angeles* v. *Preferred Communications, Inc.*, *supra*, appellee filed a motion for partial summary judgment seeking the invalidation of appellants' decision to issue only a limited number of cable franchises.

The district court granted the motion, holding that the interests advanced by appellants did not justify the restriction upon the number of franchises contained in appellants' request for proposals. See J.S. App. 16a-46a. The court entered a preliminary injunction directing appellants to issue a license permitting appellee to construct and operate a cable system in the area covered by the previously-issued franchise. The order provided that "[s]aid license will be subject to such terms and conditions that [appellants] desire and believe they have proper legal authority to require" (*id.* at 75a-76a). In response to this order, appellants awarded appellee a license to construct and operate a cable television system. The license requires appellee to include in its cable system commercial leased access channels, government access channels, and channels devoted to public and educational uses. Appellee also must offer service throughout the franchise area, satisfy certain technical and equipment standards, and make various payments to appellants, including payments of franchise fees. See *id.* at 3a, 131a-150a.

The district court directed the parties to address the constitutionality of these license requirements through cross-motions for summary judgment and, in April 1987, appellants filed a motion for partial summary judgment seeking a judgment upholding the constitutionality of certain of these requirements. Appellee subsequently filed a cross-motion for partial summary judgment contending that the requirements are unconstitutional.

On June 10, 1987, the district court sent a letter to the Attorney General certifying that the motions pending before the court drew into question the constitutionality of several provisions of the Cable Act. See J.S. App. 110a-111a. The letter stated that "[t]he United States may intervene in this action by filing a memorandum • • • addressing the question of the Act's constitutionality" (*id.* at 110a). The United States subsequently submitted to the

district court a document entitled "Response of United States to Question of Constitutionality of Cable Communications Policy Act of 1984" (*id.* at 112a-128a). The United States stated that the response was "necessarily limited, because it does not appear that specific issues on the constitutionality of provisions of the Act have been directly joined or adequately articulated by the parties to permit a complete analysis. • • • The United States concludes that it is not appropriate to address the constitutionality of the Act in this litigation at this time." *Id.* at 116a; see also *id.* at 127a-128a. In the body of its response, the government contended that the constitutionality of the Cable Act was not called into question by the motions pending before the district court (see *id.* at 120a-127a).

On September 1, 1987, the district court issued an order holding that the First Amendment barred the enforcement of the access channel, universal service, and technical and equipment requirements contained in the license granted to appellee. See J.S. App. 1a-15a. The court noted in its opinion that it had certified to the Attorney General that the constitutionality of the Cable Act had been drawn into question and that the United States had "responded" to the certification (*id.* at 1a-2a n.1).

DISCUSSION

Appellants contend that the United States became a party to this action by intervening in the district court and that the district court's interlocutory order therefore falls within this Court's mandatory appellate jurisdiction (see 28 U.S.C. 1252). Appellants' entire argument rests upon a faulty premise: examination of the record makes clear that the United States never became a party to this action. For that reason, the appeal should be dismissed for want of jurisdiction.

1. An order of a federal court "holding an Act of Congress unconstitutional in any civil action, suit, or pro-

ceeding to which the United States or any of its agencies, or any officer or employee thereof • • • is a party" may be appealed directly to this Court (28 U.S.C. 1252). Section 2403(a) of Title 28 provides that when "the constitutionality of any Act of Congress affecting the public interest is drawn in question" in any judicial proceeding to which the United States is not a party, the court must "certify such fact to the Attorney General" and "permit the United States to intervene for presentation of evidence • • • and for argument on the question of constitutionality." This Court has recognized that the requirement that the United States be a "party" to the action in the lower court for purposes of an appeal pursuant to Section 1252 is satisfied when the United States intervenes pursuant to 28 U.S.C. 2403(a) (see *Williams* v. *Zbaraz*, 448 U.S. 358, 366-367 (1980)).

Section 2403(a) grants the United States the substantive right to intervene to address challenges to the constitutionality of federal statutes; Section 2403(a) does not specify the procedures that the United States must follow in order to exercise that right. The governing provision with respect to the latter question is Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a) states that "[u]pon timely application anyone shall be permitted to intervene in an action • • • when a statute of the United States confers an unconditional right to intervene." Rule 24(c) provides that "[a] person desiring to intervene shall serve a motion to intervene upon the parties • • •. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." The rule specifically states (*ibid.*) that "[t]he same procedure shall be followed when a statute of the United States gives a right to intervene."[2]

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[2] The advisory committee notes accompanying Rule 24 expressly state that the procedures set forth in the rule apply with respect to the

2. The United States never filed a motion to intervene in this action, and the district court did not enter an order granting intervenor status to the United States. Because the requirements of Rule 24(c) were never satisfied, the United States did not become a party to this action by way of intervention. See *Bender* v. *Williamsport Area School District,* 475 U.S. 534, 548 n.9 (1986); *Spangler* v. *Pasadena City Board of Education,* 552 F.2d 1326, 1329 (9th Cir. 1977); *Moten* v. *Bricklayers, Masons, & Plasterers International Union,* 543 F.2d 224, 227 (D.C. Cir. 1976); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1914, at 408 (1986); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.12, at 24-138 (2d ed. 1987).[3]

Some courts have "in compelling circumstances" concluded that a party may be found to have intervened in an action despite the absence of both a formal motion to intervene and an order granting intervenor status. 7C C. Wright, A. Miller & M. Kane, *supra,* § 1914, at 415 (footnote omitted). Whatever the merits of such an exception to the express requirements of Rule 24 as a general matter, that exception is not applicable here for several reasons. First, courts that have overlooked the requirements of Rule 24(c) have done so in cases in which the challenge to the would-be intervenor's status is asserted by a party opposing the intervenor's interests. In that context, the party previously permitted to participate in the action as a de facto intervenor would be prejudiced by retroactive nullification of its status as a party to the litigation. See, e.g., *International Marine Towing, Inc.* v. *Southern Leasing Partners, Ltd.,* 722 F.2d 126, 129 (5th Cir. 1983), cert. denied, 469 U.S. 821 (1984); *Farina* v. *Mission Investment*

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government's statutory right to intervene in an action in order to address the constitutionality of a federal statute.

[3] Appellants do not mention Rule 24 in their jurisdictional statement.

Trust, 615 F.2d 1068, 1075 (5th Cir. 1980); *In re Beef Industry Antitrust Litigation,* 589 F.2d 786, 788-789 (5th Cir. 1979). Some courts have observed that the only result of insisting upon compliance with Rule 24(c) in that context would be a remand for the "wasteful procedure" of the filing of a motion to intervene (see *Martindell* v. *ITT Corp.,* 594 F.2d 291, 295 (2d Cir. 1979)).

The relevant considerations weigh quite differently when a party seeks to make use of this notion of "equitable" intervention to force intervenor status upon an unwilling entity. An intervenor generally "is treated as if he were an original party and has equal standing with the original parties." 7C C. Wright, A. Miller & M. Kane, *supra,* § 1920, at 488 (footnote omitted). It simply is not fair to thrust the burdens of a party status, such as discovery obligations and the potential of a binding adverse judgment and liability for costs and attorneys fees, upon an entity that never sought to become a party to the litigation and in fact does not desire that status.[4]

Second, those courts finding de facto intervention have based that determination upon much more than the ambiguous actions cited by appellants. See, *e.g., International Marine Towing, Inc.* v. *Southern Leasing Partners, Ltd., supra* (challenge to settlement); *Farina* v. *Mission Investment Trust, supra* (motion to remove); *Martindell* v. *ITT Corp., supra* (motion for relief from protective order). None of the actions taken by the United States in the present case is an action available only to a party; the government's conduct was equally compatible with that of an amicus curiae.[5]

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[4] Appellants can show no prejudice if the United States is not accorded intervenor status. All that they would lose would be the right to appeal the district court's present interlocutory order to this Court. They will still be able to exercise their right to appeal a final judgment to the court of appeals.

[5] Indeed, in view of the direct relationship between intervention by the United States under 28 U.S.C. 2403(a) and this Court's jurisdic-

For all of these reasons, the United States never became a party to the instant action. Hence, the present appeal is not within this Court's jurisdiction under Section 1252.[6]

CONCLUSION

The appeal should be dismissed for want of jurisdiction.

Respectfully submitted.

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tion under 28 U.S.C. 1252, it would be particularly inappropriate to impose intervenor status upon the United States in the present factual setting. The government frequently responds to a Section 2403(a) certification as it responded in the present case: by pointing out that, in its view, the constitutionality of the federal statute is not called into question in the case before the court. The United States generally has no interest in intervening in such a case; the response is designed to explain to the court the reasons the government has chosen not to intervene and to provide the court with the benefit of the government's analysis of the case. The government's willingness to provide such information obviously would be reduced if such a response necessarily brought with it the burdens of party status.

[6] Because the absence of the United States as a party is dispositive of the present appeal, we are not addressing the merits of the constitutional issues raised by appellants.

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